U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: 8-02-01

Case No.: **2001-INA-25**
CO No.: **19970027890**

In the Matter of:

Myron I. Peskin
Employer,

on behalf of:

Elaine Reid
Alien.

Appearance: Ngozi A. Nwauwa, Esq.
for Employer and Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Vittone, Burke and Chapman
Administrative Law Judges

LINDA S. CHAPMAN
Administrative Law Judge

Decision and Order Affirming Denial of Labor Certification

This case arose from an application for labor certification on behalf of Alien Elaine Reid ("Alien") filed by Myron I. Peskin ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

The Employer, Myron I. Peskin, submitted an Application for Alien Employment Certification, in which he sought to employ the Alien, Elaine Reid, as a "cook-live-in.[1]" The duties were described as follows:

> Prepare/Cook breakfast, lunch, supper, snacks; set/clear table for every meal; wash dishes; estimate food requirements; develop special menus, order food supplies; occasionally prepare meals for employer's friends when employer entertains at home. Prepare dishes such as: Baked whitefish, Baked vegetable cutlet, Baked stuffed green pepper, Pasta a la ratner, Fish croquettes a la ratner, Kasha, Matzo kugel, Potato pancake, Lox, Smoked sable and smoked salmon.

The position required a 12th grade high school education and two years of experience in the job offered (AF 1 4). The Alien attended high school in Jamaica from 1972 to 1975 and had been employed as a cook from September 1993 to December 1995 (AF 3-4).

On July 6, 2000, the CO issued a Notice of Findings (NOF), in which she indicated her intent to deny certification. Under 20 C.F.R. § 656.20(c)(8), the CO questioned whether the domestic cook position actually existed in the Employer's house or whether the position was "created solely for the purpose of qualifying the alien as a skilled worker under current immigration law." She required the Employer to answer a series of questions detailing the needs of the Employer's household, the Employer's past hiring practices, and the Employer's ability to pay, as well as the Alien's qualifications and information regarding how the Alien knows the Employer and/or came to be employed by the Employer. The CO also requested that the Employer explain why the position requires a live-in cook, while the work schedule is live-out in nature. Pursuant to 20 C.F.R. § 656.21(a)(3)(ii), the CO required that the Employer produce a signed and dated employment contract between the Employer and the Alien containing the information required. Pursuant to 20 C.F.R. § 656.21(a), the CO required documentation of the Alien's past paid work experience. She specifically required that the Employer document one year of paid experience in the tasks required for the current position, and the wages the Alien earned for this experience. The CO further informed the Employer of its need to document the business necessity of the requirement of two years of experience in kosher style cooking, as required by 20 C.F.R. § 656.21(b)(2). She found this requirement unduly restrictive, and noted that to prove business necessity, the Employer would have to demonstrate that the ethnic cooking requirement was related to the occupation in the context of the household and was essential to performing the job duties, as well as show that the job existed prior to filing for the alien employment certification. Otherwise, the Employer could elect to delete the ethnic/religious cooking requirement. The position would then be returned to the job service for advertisement (AF 17-22).

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[1]The job title and description of the position are those that were current when the application was forwarded to the Department of Labor for review by a certifying officer. It appears that the most recent amendments were made on July 18, 1998, though the original date of receipt of the application appears to be May 19, 1997 (AF 14).

The Employer's rebuttal materials were received on August 11, 2000. Documentation submitted included a letter from the Employer and an affidavit from the Employer. In the Employer's letter dated August 4, 2000, he stated:

> The job description in item 13 of form 750A must be changed due to a change in my household. My wife's health has deteriorated, she is being transferred to a nursing home, and I am no longer employed. I recently retired as a professor, and I am unable to perform most of the household work. Thus the request for a household worker is now imperative.
>
> Ms. Reid's function will consit [sic] of general domestic housekeeping duties such as: clean, dust, mop, wash and iron laundry, make beds, wash dishes, cook and serve food, do the grocery and prepare at least 3 meals (breakfast, lunch and dinner, snacks), which require at least 6 hours a day to prepare.

The Employer noted that no school-age children resided in the home, and the only residents were himself and his adult son. He stated that he had the funds to pay the Alien and that because he did not currently have anyone filling the position, the "request for a live-in domestic is imperative." He further stated that "Ms. Reid previously worked as a live-in domestic" and that she was referred to him by a friend and was not related to him. He needed a live-in domestic because he could not do the domestic work, he had to visit his wife periodically, public transportation was difficult to obtain, and he still had professional duties to attend to. In his affidavit, the Employer attested to the business necessity of the position, noting his inability to do housework and his wife's move to a nursing home. The employee needed to live-in because public transportation was so poor in New York City. His son worked full time and did not have time to do the housework. He indicated he had reviewed the Alien's references and had spoken with Dr. Debbie Nichalson, the Alien's previous employer. He felt the Claimant was qualified, based on the fact that "[h]er duties consisted of general domestic house keeping duties such as: clean, dust, mop, wash and iron laundry, make beds, wash dishes, cook and serve food, and to the grocery." He further attested that he could not train an employee because he had no knowledge of housework. He requested a waiver of further recruitment efforts based on his prior substantial, good faith efforts to hire a qualified U.S. worker (AF 23-27).

On August 25, 2000, the CO issued a Final Determination (FD), in which she denied certification. The CO indicated that the Employer had failed to rebut the NOF by providing documentation to satisfy 20 C.F.R. §§ 656.20(c)(8), 656.2(a)(3)(ii), 656.21(a), and 656.21(b)(2). She stated:

> Employer's rebuttal indicates the application is being changed from a Cook position which was original application to that of a Houseworker, General. Our Notice of Findings did not provide as an option changing the job offer to a different position. Therefore, employer's rebuttal does not address the issues as indicated in the Notice of Findings (See Notice of Findings).

The CO denied the application, returned the new forms to the Employer, and indicated that the Employer could refile the new application (AF 28-29). The Application for Alien Employment Certification reflects that the job title was changed to "Live-In-Domestic" and the ethnic cooking requirements were removed (AF 33).

A letter from the Employer's attorney dated September 5, 2000, but received on October 19, 2000, by the U.S. Department of Labor Employment and Training Administration, states: "Please find the enclosed submitted for your review." The letter is addressed to the Chief Administrative Law Judge, but was sent to the CO's address (AF 39). There is a copy of a certified mail envelope to that address, with the return address of the attorney, with a postmark of October 16 (AF 38). Behind the envelope is a letter dated September 25, 2000, to the Chief Administrative Law Judge from the Employer, directed to the CO's address, which has no date stamp. This letter reiterates the Employer's need for a general house worker, and notes that the Employer had not exhausted his options because he had "not yet advertised for the position of a cook," and that the Alien was "uniquely qualified for the job" (AF 37). Finally, there is a letter from Scott J. Faye, CPA/PFS, dated September 9, 2000, addressed to the Employer's attorney, also without any date stamp, stating that the Employer has the funds to pay the Alien's salary (AF 36).[2]

A Notice of Docketing and Order Requiring Statement of Position or Legal Brief was issued by the Chief Administrative Law Judge on December 7, 2000. On December 27, 2000, counsel for the Employer filed a Request for Extension of Time to Submit a Statement of Position or a Legal Brief. On January 1, 2001, the Secretary to the Board issued an Order Granting Extension of Time, in which the parties were given ten days from the date of the order to file briefs. No briefs have been received in this matter.

Discussion

20 C.F.R. 656.26(b)(1) requires that a request for review be mailed to the Certifying Officer within 35 calendar days of the date listed on the Final Determination. Although the Employer's letter requesting review was dated September 25, 2000, it, as well as the letter from Mr. Faye, dated September 9, 2000, appear to have been submitted as the enclosures with the attorney's cover letter of September 5, 2000.[3] Based on the postmark on the envelope in which the attorney sent these documents, as well as the date stamp on the attorney's letter, the request for review was not received until October 19, 2000, clearly outside the 35 day requirement, as the Final Determination was dated August 25, 2000. Accordingly, I conclude that the Employer

[2]This letter constitutes documentation that was not available to the CO when she reached her decision. Accordingly, it may not be reviewed by the Board. *See University of Texas at San Antonio*, 1988-INA-71 (May. 9, 1988).

[3]I can only presume that the Employer's counsel's cover letter was drafted in anticipation of the Employer drafting his own letter.

failed to exhaust all available administrative remedies. See 20 C.F.R. § 656.26(b)(2). Nevertheless, even were I to conclude that the request for review was timely made, I would conclude that the CO was correct in denying the application for certification.

In a similar case to the one at bar, the employer applied for labor certification for a domestic cook. *Carlos Uy III*, 1997-INA-00304 (March 3, 1999) (*en banc*). The CO denied certification based on a finding that the rebuttal failed to show that the job duties would constitute full time employment and that the job was open to U.S. workers. *Id.* The CO found that the rebuttal information did not adequately account for the alien's work time, and concluded that "the job duties to be performed by the cook do not appear to constitute full time employment. . . . . it is not convincingly documented that a domestic cook would be engaged in permanent full-time work. The employer remains in violation of 20 C.F.R. § 656.20 (c) (8) which stipulates that the job must be truly open to U.S. workers." *Id.* The Board noted that 20 C.F.R. § 656.20 (c) (8) was the correct regulatory provision to invoke when the CO believes that the job has been mischaracterized. *Id.* However, when a CO invokes this provision to deny certification, "administrative due process mandates that the CO specify precisely why the application does not appear to state a *bona fide* job opportunity." *Id.*

The Board ultimately concluded that it could not determine the CO's basis for denying certification. *Id.* However, the Board noted the factors to be taken into account when applying the totality of the circumstances test to determine whether a domestic cook position is a *bona fide* job opportunity. *Id.* These factors include the percentage of the Employer's disposable income that would be used to pay the salary; whether the employee would be engaged in his duties for a significant part of the day; whether other duties would be required of the employee, such as child care, cleaning, and other non-cooking activities; whether the employer has other domestic workers; whether a domestic cook has been retained in the past, and if not, why such a position is now offered; the extent of the alien's experience and training, and whether the experience was in the domestic cooking position; the extent of the employer's credibility, as evidenced by compliance with the process; and whether special household circumstances exist that warrant the position. *Id.* The Board further noted that:

> The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer's veracity or the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Id.

In the NOF, the CO thoroughly advised the Employer of the documentation that would be required to demonstrate that the domestic cook position was bona fide and was not an attempt to qualify the Alien as a skilled worker, rather than an unskilled worker. On rebuttal, the Employer

clearly failed to produce this documentation. In fact, the Employer admitted that his needs had changed and that he sought to hire the Alien as a live-in domestic worker, whose duties would involve housework in addition to cooking. The Employer also noted that the Alien's previous position had been as a domestic, contrary to the initial representation that the Alien had previously been employed as a cook. Thus, the Alien's rebuttal information confirmed the CO's suspicion that the position sought was really that of an unskilled worker. In the FD, the CO correctly noted that the NOF had not given the Employer the option to amend the nature of the position and that the Employer had not provided documentation to satisfy the requirement of 20 C.F.R. § 656.20(c)(8).

The evidence in this case overwhelmingly supports a finding that the position was not a *bona fide* domestic cook position, under the standards set forth in *Carlos Uy III*, 1997-INA-00304 (March 3, 1999) (*en banc*).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Linda S. Chapman
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five

double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.